

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation**

NOTICE OF PROPOSED RULEMAKING

Subject Matter of Regulations: Workers' Compensation – Return to Work

**TITLE 8, CALIFORNIA CODE OF REGULATIONS
Sections 9780 et seq.**

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in her by Labor Code sections 59, 133, and 4603.5, proposes to adopt sections 10001 through 10005 in Article 12 of Chapter 4.5, Subchapter 1, of Title 8, California Code of Regulations, commencing with section 10001, relating to Return to Work.

PROPOSED REGULATORY ACTION

- 1. Proposed Section 10001. Definitions.**
- 2. Proposed Section 10002. Offer of Work; Adjustment of Permanent Disability Payments.**
- 3. Proposed Section 10003. Form [DWC AD 10003 Notice of Offer of Work.]**
- 4. Proposed Section 10004. Return to Work Program.**
- 5. Proposed Section 10005. Form [DWC AD 10005 Request for Reimbursement of Accommodation Expenses.]**

PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, oral or in writing, with respect to the subjects noted above, on the following dates:

Date: December 15, 2005
Time: 10:00 am to 5:00 pm or conclusion of business
Place: Elihu Harris State Building, Auditorium
1515 Clay Street,
Oakland, CA 94612

The State Office Building and its Auditorium are accessible to persons with mobility impairments. Alternate formats, assistive listening systems, sign language interpreters, or other type of reasonable accommodation to facilitate effective communication for persons with disabilities, are available upon request. Please contact the State Wide Disability Accommodation Coordinator, Stephanie Leach, at 1-866-681-1459 (toll free), or through the California Relay Service by dialing 711 or 1-800-735-2929 (TTY/English) or 1-800-855-3000 (TTY/Spanish) as soon as possible to request assistance.

Please note that public comment will begin promptly at 10:00 a.m. and will conclude when the last speaker has finished his or her presentation. If public comment concludes before the noon recess, no afternoon session will be held.

The Administrative Director requests, but does not require that, any persons who make oral comments at the hearings also provide a written copy of their comments. Equal weight will be accorded to oral comments and written materials.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Department of Industrial Relations, Division of Workers' Compensation. The written comment period closes at **5:00 p.m., on December 15, 2005**. The Department of Industrial Relations, Division of Workers' Compensation will consider only comments received at the Department of Industrial Relations, Division of Workers' Compensation by that time. Equal weight will be accorded to oral comments presented at the hearing and written materials.

Submit written comments concerning the proposed regulations prior to the close of the public comment period to:

Maureen Gray
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

Written comments may be submitted by facsimile transmission (FAX), addressed to the above-named contact person at (510) 286-0687. Written comments may also be sent electronically (via e-mail) using the following e-mail address: dwcrules@dir.ca.gov.

Unless submitted prior to or at the public hearing, Ms. Gray must receive all written comments no later than 5:00 p.m. on December 15, 2005.

AUTHORITY AND REFERENCE

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in the Administrative Director by Labor Code sections 59, 133, 139.48, and 5307.3.

Reference is to Labor Code sections 62.5, 139.48, 4658, 4658.1, and 5814.6.

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW

The Legislature passed Senate Bill 899 in response to the State's widely-acknowledged workers' compensation crisis. SB 899 revised the return to work program under Labor Code section 139.48. This statute, initially enacted in 2002 as part of AB 749, provides that the Administrative Director shall establish a Return to Work Program in order to promote the early and sustained return to work of an employee following a work-related injury or illness and shall adopt regulations to carry out this section. This section further provides for the establishment of a Return to Work Fund, and for limited

reimbursement to small employers for expenses incurred in providing modified work to injured employees. Labor Code section 139.48 applies to injuries on or after July 1, 2004.

Senate Bill 899 also added subdivision (d) to Labor Code section 4658, which increases the number of weeks of permanent disability indemnity for severe disabilities (70% and above). This subdivision also includes: (1) an incentive, by way of a permanent partial disability benefit payment reduction, for employers to offer to return injured employees to regular, modified or alternative work, and (2) a disincentive, by way of a permanent partial disability benefit payment increase, for employers who fail to provide an injured employee with a return to work offer. Subdivision (d) is mandated to apply to injuries occurring on or after the effective date of the revised permanent disability schedule that was adopted by the Administrative Director pursuant to Labor Code section 4660 on January 1, 2005. AB 899 also added 4658.1, which provides definitions of terms used in Article 3, including section Labor Code section 4658.

The Return to Work Program provisions under 139.48 became effective for injuries on or after July 1, 2004, and the return to work incentive under subdivision (d) is effective for injuries on or after January 1, 2005. Thus, injured workers, employers, and insurers are already attempting to deal with these statutory requirements without regulatory guidance. These regulations will guide affected parties through the statutory scheme and help effectuate a worker's prompt return to work, which will result in cost savings to employers and higher post-injury earnings for injured workers.

The Administrative Director now adopts administrative regulations governing Return to Work. These regulations implement, interpret, and make specific sections 139.48, 4658 and 4658.1 of the Labor Code as follows:

1. Proposed Section 10001. Definitions.

This section provides definitions for the following key terms: "Alternative work," "Claims Administrator," "Modified Work," "Permanent and stationary," and "Regular work." The definitions are provided to ensure that their meaning, as used in the regulations, will be clear to the workers' compensation community.

2. Proposed Section 10002. Offer of Work; Adjustment of Permanent Disability Payments.

Subdivision (a) of this section provides that it shall apply to all injuries occurring on or after January 1, 2005. This section shall apply to the following employers: (1) insured employers who employed 50 or more employees at the time of the most recent policy inception or renewal date for the insurance policy that was in effect at the time of the employee's injury; and (2) self-insured employers who employed 50 or more employees at the time of the most recent filing by the employer of the Self-Insurer's Annual Report that was in effect at the time of the employee's injury; and (3) legally uninsured employers who employed 50 or more employees at the time of injury.

Subdivision (b) of this section provides that within 60 calendar days from the date that an injured employee's condition becomes permanent and stationary: (1) if an employer does not serve the employee with a notice of offer of regular work, modified work or alternative work for a period of at least 12 months, each payment of permanent partial disability remaining to be paid to the employee from the date of the end of the 60 day period shall be paid in accordance with Labor Code section 4658(d)(1) and increased by 15 percent ; (2) if an employer serves the employee with a notice of offer of regular work, modified work or alternative work for a period of at least 12 months, and in accordance with the requirements set forth in paragraphs (3), and (4), each payment of permanent partial disability remaining

to be paid from the date the offer was served on the employee shall be paid in accordance with Labor Code section 4658(d)(1) and decreased by 15 percent, regardless of whether the employee accepts or rejects the offer; (3) the employer shall use Form DWC-AD 10133.53 (Section 10133.53) to offer modified or alternative work, or Form DWC-AD 10003 (Section 10003) to offer regular work, additionally, the claims administrator may serve the offer of work on behalf of the employer; and (4) the regular, alternative, or modified work that is offered by the employer pursuant to paragraph (2) shall be located within a reasonable commuting distance of the employee's residence at the time of the injury, unless the employee waives this condition. This condition shall be deemed to be waived if the employee accepts the regular, modified, or alternative work, and does not object to the location within 20 days of being informed of the right to object. The condition shall be conclusively deemed to be satisfied if the offered work is at the same location and the same shift as the employment at the time of injury.

Subdivision (c) of this section provides that in the event there is a dispute as to an employee's permanent and stationary status, and there has been a notice of offer of work served on the employee in accordance with subdivision (b), the claims administrator may withhold 15% from each payment of permanent partial disability remaining to be paid from the date the notice of offer was served on the employee until there has been a final judicial determination of the date that the employee is permanent and stationary pursuant to Labor Code section 4062. Where there is a final judicial determination that the employee is permanent and stationary on a date later than the date relied on by the employer in making its offer of work, the employee shall be reimbursed any amount withheld up to the date a new notice of offer of work is served on the employee pursuant to subdivision (b). Where there is a final judicial determination that the employee is not permanent and stationary, the employee shall be reimbursed any amount withheld up to the date of the determination. The claims administrator is not required to reimburse permanent partial disability benefit payments that have been withheld pursuant to this subdivision during any period for which the employee is entitled to temporary disability benefit payments.

Subdivision (d) of this section provides that if the employee's regular work, modified work, or alternative work that has been offered by the employer pursuant to paragraph (1) of subdivision (b) and has been accepted by the employee, is terminated prior to the end of the period for which permanent partial disability benefits are due, the amount of each remaining permanent partial disability payment from the date of the termination shall be paid in accordance with Labor Code section 4658 (d) (1), as though no decrease in payments had been imposed, and increased by 15 percent. An employee who voluntarily terminates his or her regular work, modified work, or alternative work shall not be eligible for the 15 percent increase in permanent partial disability payments pursuant to this subdivision.

Subdivision (e) of this section provides that nothing in this section shall prevent the parties from settling or agreeing to commute the permanent disability benefits to which an employee may be entitled. However, if the permanent disability benefits are commuted by a Workers' Compensation Administrative Law Judge or the Workers' Compensation Appeals Board pursuant to Labor Code section 5100, the commuted sum shall account for any adjustment that would have been required by this section if payment had been made pursuant to Labor Code section 4658.

3. Proposed Section 10003. Form [DWC AD 10003 Notice of Offer of Work.]

This section is a three-page form entitled "DWC-AD 10003 Notice of Offer of Regular Work For Injuries Occurring on or after 1-1-05." This form shall be used when the employer or claims administrator makes an offer of regular work to the employee. The first page of the form is to be completed by the employer or claims administrator. The second page of the form is to be completed by the employee. The last page of the form is a proof of service.

4. Proposed Section 10004. Return to Work Program.

This proposed section applies to injuries occurring on or after July 1, 2004, and provides definitions for the following key terms used in this section only: “Eligible Employer,” and “Full-time employee.”

This section also provides that the Return to Work Program is administered by the Administrative Director for the purpose of promoting the employee’s early and sustained return to work following a work-related injury or illness.

This section also provides that the Return to Work Program shall be funded by the Return to Work Fund which shall consist of all penalties collected pursuant to Labor Code section 5814.6 and transfers made to this fund by the Administrative Director from the Workers’ Compensation Administrative Revolving Fund established pursuant to Labor Code section 62.5. The reimbursement offered to eligible employers as set forth in this section shall be available only to the extent funds are available.

This section also provides that an eligible employer shall be entitled to reimbursement through this program for expenses incurred to make workplace modifications to accommodate an employee’s return to modified or alternative work, up to the following maximum amounts: (1) \$1,250 to accommodate each temporarily disabled employee, for expenses incurred in allowing such employee to perform modified or alternative work within physician-imposed temporary work restrictions; and (2) \$2,500 to accommodate each permanently disabled employee, for expenses incurred in returning such employee to sustained modified or alternative work within physician-imposed permanent work restrictions; however, if an employer who has received reimbursement for a temporarily disabled employee under paragraph (1) is also requesting reimbursement for the same employee for accommodation of permanent disability, the maximum available reimbursement is \$2,500. For the purpose of this subdivision, “sustained modified or alternative work” is work anticipated to last at least 12 months.

This section also provides that reimbursement shall be provided for any of the following expenses, provided they are specifically prescribed by a physician or are reasonably required by restrictions set forth in a medical report: modification to worksite, equipment, furniture, tools, or any other necessary costs reasonably required to accommodate the employee’s restrictions.

This section also provides that an eligible employer seeking reimbursement pursuant to subdivision (d) shall submit a “Request for Reimbursement of Accommodation Expenses” (Form DWC AD 10005, section 10005) to the Division of Workers’ Compensation Return to Work Program within ninety (90) calendar days from the date of the expenditure for which the employer is seeking reimbursement. As a condition to reimbursement, the expenditure shall not have been paid or covered by the employer’s insurer or any source of funding other than the employer. The filing date may be extended upon a showing of good cause for such extension. The employer shall attach to its request copies of all pertinent medical reports that contain the work restrictions being accommodated, any other documentation supporting the request, and all receipts for accommodation expenses. Requests should be sent to the mailing address for the Division of Workers’ Compensation Return to Work Program that is listed in the web site of the Division of Workers’ Compensation, at: http://www.dir.ca.gov/dwc/dwc_home_page.htm

This section also provides that the Administrative Director or his or her designee shall review each “Request for Reimbursement of Accommodation Expenses,” and within sixty (60) business days of receipt shall provide the employer with notice of one of the following: (1) that the request has been approved, together with a check for the reimbursement allowed, and an explanation of the allowance, if

less than the maximum amounts set forth in subdivision (d); or (2) that the request has been denied, with an explanation of the basis for denial; or (3) that the request is deficient or incomplete and indicating what clarification or additional information is necessary.

This section also provides that in the event there are insufficient funds in the Return to Work Fund to fully reimburse an employer or employers for workplace modification expenses as required by this section, the Administrative Director shall utilize the following priority list in establishing the amount of reimbursement or whether reimbursement is allowed, in order of decreasing priority as follows: (1) employers who have not previously received any reimbursement under this program; (2) employers who have not previously received any reimbursement under this program for the employee who is the subject of the request; (3) employers who are seeking reimbursement for accommodation required in returning a permanently disabled employee to sustained modified or alternative work; and (4) employers who are requesting reimbursement for accommodation required by a temporarily disabled employee.

This section also provides that an eligible employer may appeal the Administrative Director's notice under subdivision (i) by filing a Declaration of Readiness to Proceed with the local district office of the Workers' Compensation Appeals Board within twenty calendar days of the issuance of the notice, together with a petition entitled "Appeal of Administrative Director's Reimbursement Allowance," setting forth the basis of the appeal. A copy of the Declaration of Readiness to Proceed and the petition shall be concurrently served on the Administrative Director.

5. Proposed Section 10005. Form [DWC AD 10005 Request for Reimbursement of Accommodation Expenses.]

This proposed section is a form entitled "Request for Reimbursement of Accommodation Expenses For injuries on or after July 1, 2004, Form DWC AD 10005." This form is to be completed by the employer or employer's representative in order to request reimbursement of accommodation expenses.

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Administrative Director has made the following initial determinations:

- Significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None.
- Adoption of these regulations will not: (1) create or eliminate jobs within the State of California, (2) create new businesses or eliminate existing businesses within the State of California, or (3) affect the expansion of businesses currently doing business in California.
- Effect on Housing Costs: None.
- The Division of Workers' Compensation is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

EFFECT ON SMALL BUSINESS

The Administrative Director has determined that the proposed regulations will not affect small business. All small businesses, including self-insured employers and third party claims administrators, are required by law to provide workers' compensation benefits to injured workers and to comply with workers' compensation regulations. Here, the requirement that an employer must serve the employee with a notice of offer of regular work, modified work or alternative work within 60 days from the date that the injured worker's condition becomes permanent and stationary or be required to increase each payment of permanent partial disability by 15 percent, does not apply to small businesses because this provision only applies to employers with 50 or more employees. With respect to the Return to Work Program contained in the regulations, if a business which employs 50 or fewer full-time employees incurs expenses in order to make workplace modifications to accommodate an employee's return to modified or alternative work, that employer may be reimbursed by the Return to Work Fund.

FISCAL IMPACTS

- Costs or savings to state agencies or costs/savings in federal funding to the State: The Division of Workers' Compensation will incur costs associated with the reimbursement program. The Division submitted a budget change proposal for the fiscal year 2006-2007 to authorize the funding for the costs. State agencies who are employers who comply with the requirement that an employer must serve the employee with a notice of offer of regular work, modified work or alternative work within 60 days from the date that the injured worker's condition becomes permanent and stationary would not be required to increase each payment of permanent partial disability by 15 percent and would be eligible for a 15 percent decrease in remaining permanent partial disability benefit payments.
- Local Mandate: None. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district.
- Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None. The proposed regulations do apply to a local agency or school district in its capacity as an employer required to provide workers' compensation benefits to injured workers.
- Other nondiscretionary costs/savings imposed upon local agencies: None.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code Section 11346.5(a)(13), the Administrative Director must determine that no reasonable alternative considered or that has otherwise been identified and brought to the Administrative Director's attention would be more effective in carrying out the purpose for which the actions are proposed or would be as effective and less burdensome to affected private persons than the proposed actions.

The Administrative Director invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS

Pursuant to Government Code section 11346.45, the text of the draft proposed regulations was made available for pre-regulatory public comment through the Division's Internet message board (the DWC Forums). Additionally, the proposed regulations were made available for discussion and comment to an advisory group made up of representatives from the workers' compensation community.

AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, RULEMAKING FILE AND DOCUMENTS SUPPORTING THE RULEMAKING FILE / INTERNET ACCESS

An Initial Statement of Reasons and the text of the proposed regulations in plain English have been prepared and are available from the contact person named in this notice. The entire rulemaking file will be made available for inspection and copying at the address indicated below.

As of the date of this notice, the rulemaking file consists of the notice, the initial statement of reasons, the proposed text of the regulations, pre-rulemaking comments, and the Form 399. Also included are studies and documents relied upon in drafting the proposed regulations.

In addition, the Notice, Initial Statement of Reasons, and proposed text of regulations may be accessed and downloaded from the Division's website at www.dir.ca.gov. To access them, click on the "Proposed Regulations - Rulemaking" link and scroll to "Division of Workers' Compensation regulations" and then scroll down the list of rulemaking proceedings to find the current Return to Work rulemaking link.

Any interested person may inspect a copy or direct questions about the proposed regulations and any supplemental information contained in the rulemaking file. The rulemaking file will be available for inspection at the Department of Industrial Relations, Division of Workers' Compensation, 1515 Clay Street, Oakland, California, between 9:00 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed regulations, initial statement of reasons and any information contained in the rulemaking file may be requested in writing to the contact person.

CONTACT PERSON

Nonsubstantive inquiries concerning this action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be requested in writing at the same address. The contact person is:

Maureen Gray
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142
E-mail: mgray@dir.ca.gov

The telephone number of the contact person is (510) 286-7100.

BACKUP CONTACT/PERSON CONTACT PERSON FOR SUBSTANTIVE QUESTIONS

In the event the contact person is unavailable, or to obtain responses to questions regarding the substance of the proposed regulations, inquiries should be directed to the following backup contact persons:

Linda Pancho (lpancho@dir.ca.gov)
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

The telephone number of the backup contact persons is (510) 286-7100.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING

If the Administrative Director makes changes to the proposed regulations as a result of the public hearing and public comment received, the modified text with changes clearly indicated will be made available for public comment for at least 15 days prior to the date on which the regulations are adopted.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, the Final Statement of Reasons will be available and copies may be requested from the contact person named in this notice or may be accessed on the website: www.dir.ca.gov

AUTOMATIC MAILING

A copy of this Notice, the Initial Statement of Reasons, and the text of the regulations, will automatically be sent to those interested persons on the Administrative Director's mailing list.

If adopted, the regulations as amended will appear in Title 8, California Code of Regulations, commencing with section 10001.